

WINDSOR W. KESSLER, III,)
)
 Plaintiff,)
)
 v.) Case No. 3:18-cv-530-JPG-DGW
)
 RANDALL PASS, LESLEE BROOKS, and)
 WARDEN OF THE UNITED STATES)
 PENITENTIARY – MARION, ILLINOIS,)
)
 Defendants.)

deadline to amend pleadings. As such, the Court considers the motion timely and will not require the heightened showing of good cause. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 719-720 (7th Cir. 2011).

A claim for medical negligence made in Illinois and pursuant to the Federal Tort Claims Act is subject to the requirements of the Illinois' Healing Art Malpractice Act. 735 ILL.COMP.STAT. § 5/2-622; *see also Gipson v. United States*, 631 F.3d 448, 451-2 (7th Cir. 2011) (Indiana); *Bowen v. United States*, 570 F.2d 1311, 1315-6 (7th Cir. 1978) (Illinois). The statute provides that a plaintiff must file an affidavit with a complaint¹ declaring one of three things: first, that the affiant has consulted with a qualified health professional who determined that the plaintiff has a reasonable and meritorious claim and who has drafted a written report that is attached to the affidavit; second, that the affiant is unable to so consult because it could not be done prior to the running of a statute of limitations (in which case the certification and written report must be filed within 90 days of filing the complaint); or third, that a request for records has been made but have not been produced, in which case, the affidavit and report are due 90 days after the records are received. *Id.*; 735 ILL. COMP.STAT. § 5/8-2001.²

Plaintiff has filed no affidavit along with his proposed amended complaint. Plaintiff also does not indicate that an affidavit will be forthcoming. As such, his proposed amendment is futile at this time. Plaintiff may refile this motion along with the necessary affidavit. As to Plaintiff's

¹ Whether or not Plaintiff is required to file such an affidavit at the time of his complaint may be open to debate. *See Parker v. United States*, 721 Fed.Appx. 531, 533 (7th Cir. 2018) (suggesting in dicta that a complaint filed in federal court need not include evidence, such as the affidavit required by state law); *but see Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (stating that dismissal is mandatory if a plaintiff fails to abide by the affidavit requirement); *Hahn v. Walsh*, 762 F.3d 617, 629 (7th Cir. 2014) (concerning this statute in particular). No Court in this District has waived the affidavit requirement.

² The text of this statute was recently amended in a manner that does not affect its applicability to this matter. *See* 2018 Ill. Legis. Serv. P.A. 100-814 (H.B. 4848) (West).

proposed retaliation claim, he states that he does not intend to make such a claim at this time and will seek to amend after he has exhausted his administrative remedies.

Plaintiff's Motion to Compel/ for subpoena (Doc. 64) is **DENIED AS MOOT**. This motion is related to Defendants' now withdrawn motion for summary judgment on exhaustion (Docs. 44, 67, 69). Plaintiff's "Request for Court Intervention" (Doc. 75) also is **DENIED**. Much of this motion appears related to the exhaustion of administrative remedies that no longer is at issue in this lawsuit (Plaintiff asserts that documents related to his administrative remedies have been fabricated in this case and with respect to another tort claim). He also states that he cannot fully respond to requests to produce because he does not have access to documents. Plaintiff is not required to produce documents he does not have; he need only state that he does not have the document or does not have access to them in response to the requests to produce. To the extent that Plaintiff believes that any of the documents are related to a claim or defense (and that they have been altered or fabricated), he can present them along with a response to a motion for summary judgment or at trial.

Finally, Plaintiff's Motion to Stay (Doc. 85) is **DENIED** and the Notices (Docs. 86 and 87) are **STRICKEN**. To the extent that Plaintiff seeks to amend his complaint, he must file a motion pursuant to Rule 15. To the extent that Plaintiff seeks additional injunctive relief, he must file a motion consistent with Rule 65.

DATED: November 15, 2018



DONALD G. WILKERSON
United States Magistrate Judge